IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00219 COA

ELIZABETH BATES, A/K/A ONIE E. BATES, AND BOBBY C. TAYLOR

APPELLANTS

v.

LEXINGTON INSURANCE COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

CATHERINE H. JACOBS

CLYDE H. GUNN

ATTORNEYS FOR APPELLEE:

KEN R. ADCOCK

BONNIE J. BRIDGERS

NATURE OF THE CASE: INSURANCE CONTRACT - CLAIM FOR ACTUAL AND PUNITIVE DAMAGES FOR INSURER'S FAILURE TO DEFEND

TRIAL COURT DISPOSITION: JUDGMENT FOR DEFENDANT - APPELLEE

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

COLEMAN, J., FOR THE COURT:

Two insurance agents, Elizabeth Bates (Bates) and Bobby C. Taylor (Taylor), sued their errors and omissions carrier, Lexington Insurance Company (Lexington), for its failure to defend them in two lawsuits. Pursuant to the jury's verdict for Lexington, the trial court entered final judgment for Lexington. Bates and Taylor appeal from the trial court's denial of their motion for JNOV or in the alternative a new trial. We affirm.

I. FACTS

A. Bobby C. Taylor's three corporations

Bates and Taylor, sister and brother, were experienced insurance agents who sold employee group health and medical coverage which the National Business Association Trust (NBAT) provided to employers in Florida, Louisiana, and Mississippi. Taylor operated, or was closely associated with, three agencies from which Bates, another principle, James Carraway, and he sold NBAT's and other coverages. One agency was located in Jackson. The Jackson agency was incorporated as a Mississippi corporation under the name of Southern Marketing Services, Inc. (Southern Marketing). Taylor owned fifty two percent of the stock in Southern.

A second agency was located in Baton Rouge, Louisiana. It was incorporated as a Louisiana corporation under the name of Southern Marketing Services of Louisiana. Taylor owned all of the stock in this Louisiana corporation. The third agency, which was located in Biloxi, was incorporated as a Mississippi corporation under the name of Taylor-Carraway Benefit Administrators (Taylor-Caraway). Originally Taylor owned fifty two percent of the stock in Taylor-Caraway; James Carraway owned twenty four percent of its stock; and Taylor's brother, Charles, owned the remaining twenty four percent of its stock. Both Carraway and Charles Taylor sold their stock to Bobby Taylor.

For the purpose of selling insurance products, Taylor, Bates, and Carraway apportioned the states of Florida, Louisiana, and Mississippi among them as follows: Bates was responsible for marketing in Mississippi north of Hattiesburg up to Tupelo. Carraway, who ran the Biloxi office, sold insurance in Mississippi south of Hattiesburg and in the Florida panhandle. Taylor became responsible for selling insurance in Louisiana, where he worked in the Baton Rouge agency, Southern Marketing Services of Louisiana.

B. National Business Association Trust

We next describe the rise and fall of NBAT because Taylor's and Bates' business relationships with it spawned this litigation. About the year 1984, several Coca Cola bottling companies in the vicinity of Louisville, Kentucky, formed NBAT to provide medical and health protection for their employees. These bottlers organized NBAT pursuant to the Employees Pension Reform Act of 1974, which is a federal statute. Such trusts are commonly known as ERISA trusts.

The laws of the various states require traditional insurance companies to maintain financial reserves from which to pay their insureds' claims. Unlike traditional insurance companies, ERISA trusts are designed to pay their beneficiaries' claims from income generated solely by the contributions, or "premiums," which employers who belong to the trust pay a third-party administrator for the trust. ERISA trusts like NBAT are not designed to maintain such reserves from which to pay their beneficiaries' claims.

However, to compensate for the lack of reserves, an ERISA trust may acquire either specific or aggregate "stop-loss" insurance coverage with a traditional insurance company. The stop-loss insurance establishes the parameter of the trust's risk. A specific stop-loss coverage establishes a specific ceiling on a single employee's claim, above which the insurance company will indemnify the trust. An aggregate stop-loss coverage establishes an annual maximum amount of claims, above which the insurance company must indemnify the trust. For example, NBAT initially enjoyed specific stop-loss coverage above the amount of either $35,000 or $50,000. Later, NBAT raised the amount of its specific stop-loss coverage to $100,000.00. Still later, it again raised this amount to $500,000. NBAT never had aggregate stop-loss coverage.

ERISA trusts quickly begot a controversy about the extent to which state regulatory authorities such as Mississippi's Department of Insurance might regulate them. Federal law allowed the United States Department of Labor to regulate ERISA trusts to some extent.

Against this background of general information we sketch the specific events of the NBAT saga into which Bates and Taylor were inexorably drawn. In the spring of 1989, a resident of Kentucky complained to the Kentucky Department of Insurance (KDI) that NBAT had not paid a medical bill for which it was liable. In response to that complaint, KDI began to investigate NBAT and National Benefit Administrators, Inc. (NBA), which served as NBAT's third-party administrator in Kentucky. In the course of this investigation, the Commissioner of the Kentucky Department of Insurance brought suit against both NBAT and NBA in the Circuit Court of Franklin County, Kentucky. That court adjudicated that because the Kentucky Commissioner of Insurance had not issued a certificate of authority to it, NBAT was an unauthorized insurer as defined by Kentucky Revised Statute 304.030.

On October 24, 1989, the State of Georgia entered a "cease and desist" order against NBAT by which NBAT was ordered to discontinue all business operations within that state. On December 13, 1989, the State of Florida also entered a cease and desist order against NBAT. On January 4, 1990, the Mississippi Commissioner of Insurance, George Dale, also issued a cease and desist order to NBAT. The Circuit Court of Franklin County, Kentucky, which had earlier adjudicated that NBAT was an unauthorized insurer in Kentucky, entered an order by which it placed NBAT into liquidation as of June 1, 1990. Both NBAT and NBA had closed their doors for business as of that date, and neither ever again opened their doors. NBAT remained in receivership proceedings in the Commonwealth of Kentucky as of November 1992, when the Hinds County Circuit Court tried this case.

C. Bobby C. Taylor

Taylor began his career in the insurance industry in 1971 as a salesman for Metropolitan Insurance Company, in which job he worked for two years. For the next two years he worked as a sales

manager for Metropolitan. He then opened his own insurance agency, Taylor Insurance Agency, in Biloxi about 1975. His brother, Charles Taylor, and his friend, James Carraway, joined him in the agency, and later became partners with him in that business. They incorporated the agency and changed its name to Taylor-Carraway Insurance Agency. Their agency sold both individual and group life and health insurance policies. In the middle 1980's, these three partners again changed the name of their business to Taylor-Carraway Benefit Administrators. Bates, who had been working as secretary for the administrator of the Howard Memorial Hospital, joined her two brothers and Carraway in the agency, where she began to work as office manager.

In 1986 Taylor-Carraway Benefit Administrators contracted with Allstate Insurance Company in Northbrook, Illinois, via a franchise to represent Allstate as a claims payer through their Biloxi agency. Allstate next persuaded Taylor and his partners to open a claims paying operation in Jackson. Still later Taylor and his partners opened a third claims-paying operation for Allstate in Baton Rouge, Louisiana. Regardless of their contracts with Allstate, Taylor, his brother Charles, Bates, and Carraway also began to market group insurance plans for insurance companies such as Prudential, Allstate, and Lamar Life.

After Taylor and his partners had begun serving Northbrook Insurance Company, a subsidiary of Allstate Insurance Company which wrote the group medical and health insurance policies, Allstate and Northbrook in 1988 notified Taylor that six months after the date of its notification, Northbrook would discontinue writing these group policies. Thus, Taylor began to search for another company for whom to sell these group medical and health policies and to pay the claims which were made against these group policies. John Mulhearn with Allstate suggested to Taylor that he investigate NBAT of Louisville, Kentucky, as a possible replacement for Northbrook Insurance Company. In the fall of 1987, Andy Glogower, who had once been in the coal mining business but who had since become the chairman of the board of NBAT, and Max Underwood, also with NBAT, met with Taylor, Bates, Carraway, and others in their Jackson office. After this meeting, Taylor flew to Louisville, Kentucky, where he inspected the NBAT enterprise. After these two encounters, Taylor and his partners began selling NBAT’s group coverages on October 1, 1987.

Taylor and his partners received thirteen percent of the premiums for their services to NBAT. Their services included claims processing for NBAT as well as sales of its group coverages. After they began selling coverages by NBAT, the number of groups to whom they had sold NBAT’s coverage increased from approximately one hundred to over five hundred. The gross income for Taylor’s three agencies averaged $200,000 per month. Taylor and his partners accounted for between twenty five and thirty percent of NBAT’s total premiums paid within the United States. The premiums which Taylor’s three agencies collected from NBAT amounted to between eighty and ninety percent of their income.

According to one of Taylor’s former employees, Deborah McGrath, a witness for Lexington, the tide of success may have begun to ebb by August 1989. McGrath testified that at a sales meeting in Biloxi in August 1989, Taylor stated that every effort ought to be made to switch these groups which NBAT had covered to other companies. According to McGrath, Taylor explained that "He didn’t want to put all of his eggs in one basket because he was afraid that NBAT would go out of business." According to McGrath, Taylor and his partners sold no new coverage by NBAT after this sales meeting in August of 1989.

On May 6, 1990, Glogower wrote to advise Taylor that he had resigned as president of the National Business Associates, the third-party administrator for NBAT in Kentucky. As of that same date, NBA had not paid Taylor and his partners their commissions for the months of April and May 1990. After Taylor received Glogower's letter of May 6, 1990, he arranged a conference with George Dale, Mississippi's Commissioner of Insurance, which Bates and Carraway also attended. Taylor testified that he acknowledged that he was "scared" and that "[w]e [had] a potential problem here" at this conference with Commissioner Dale. Taylor then related to the commissioner his plan to deal with the problem. He included in his plan a trip to Louisville, Kentucky, to confront Glogower about the financial condition of NBAT.

Taylor, together with the general agent for NBAT for the State of Georgia and a representative of the North Carolina general agent, conferred with Glogower in Louisville. According to Taylor's testimony, Glogower was evasive and uncooperative with his *ad hoc* delegation. Taylor and the other two then met with Doug Walsh, NBAT's executive director, in Louisville. Walsh was equally uncooperative. However, Walsh did authorize Taylor to keep the future premiums from which his agencies could pay claims directly. After his return to Mississippi, Taylor reported to Commissioner Dale about his conferences with Glogower and Walsh.

Taylor testified that pursuant to Walsh's authorization, his agencies and he collected approximately $500,000. Of this amount, Taylor spent an estimated $187,000 to pay his agencies' overhead "to keep their doors open" so that they could continue to pay the insured employees' claims. Thirteen percent of $500,000, the usual commission rate, would have been $65,000, so Taylor's partners and his agencies retained an extra $122,000 to which their commissions would not have otherwise entitled them.

With the assistance of the Mississippi Insurance Department, Taylor transferred the entire block of NBAT coverage to Blue Cross - Blue Shield as of June 1, 1990. We noted that on that same day the Kentucky Department of Insurance seized the assets of NBAT, after which NBAT and its third-party administrator, NBA, remained closed for business.

D. Taylor's errors and omissions policy with Lexington

Lexington had insured Taylor against errors and omissions claims since 1986. Taylor's then current policy expired on July 30, 1990. California Pacific Property and Casualty Insurance Agency (Cal-Pac) in Petaluma, California, was Lexington's nationwide agent for errors and omissions policies for insurance agents. On June 22, 1990, Taylor applied through Cal-Pac to renew his errors and omissions policy. Included in Taylor's application were the following questions to which Taylor gave the following answers:

2. In the past five years have you:

A. Been found guilty of violating any federal or state insurance law or regulation? NO.

B. Been denied E&O coverage or has any company canceled E&O coverage? NO.

C. Sustained an E&O loss or had such a claim made against you? NO.

D. Any reason to anticipate a claim being made against you? NO.

> EXPLAIN ANY YES ANSWERS (For claims, a letter from the court or defense attorney is needed. You must report known occurrences which may result in suit to your current carrier. Prior acts coverage does not cover known occurrences.)

Farther down in the application are the following sentences:

> I understand and agree that:
>
> The above statements are of a material nature and have been made as a basis for insurance coverage.

> THE UNDERSIGNED applicant declares that the statements set forth herein are true and agrees that if the information on this application changes between the date of the application and the effective date of the insurance, he/she (undersigned) will immediately notify the insurers of such changes, and the insurer may withdraw any outstanding quotations and/or authorization for agreements to bind the insurance.

Before Taylor submitted his application for renewal of Lexington's errors and omissions policy to Cal-Pac on June 22, five of Taylor-Carraway's clients had written letters addressed to Taylor-Carraway, James Carraway, or Charles Taylor to advise the respective addressees that NBAT had failed to pay at least one of their employees' claims and that they expected Taylor-Carraway to pay these claims if NBAT did not pay them. Ed H. Saylor wrote to Taylor-Carraway on behalf of his business, Ed Saylor Chrysler, Plymouth, Dodge, Inc., in Gulfport on June 4, 1990. On June 8, Jeff Taylor, Vice President and Controller of Highpointe Hotel Corporation in Gulf Breeze, Florida, wrote to James Carraway. Kenneth Kiser, Supervisor of the Southern Pine Inspection Bureau in Huntsville, Texas, wrote to Taylor-Carraway on June 13, 1990, a copy of which he mailed to the "State Board of Insurance, Jackson, Miss." Curtis R. Mather, managing partner of Gulf Cold Storage, Inc., in Pascagoula, wrote to Charles Taylor, President, Taylor-Carraway, another letter on June 13, 1990. Robert L. Berman wrote the fifth letter to James Carraway on June 15, 1990.

Admiral Insurance Company (Admiral) had issued an errors and omissions policy to Taylor-Carraway in an amount of $500,000. On July 3, 1990, Taylor wrote Admiral to notify it of the five written demands which Taylor-Carraway had already received in June. He wrote that the purpose of his letter was "to put the company on notice of potential claims."

After June 22, but before July 31, the effective date of the renewed errors and omissions policy, four other clients wrote similar demand letters to Bobby C. Taylor, Charles Taylor, or Taylor-Carraway. Bird-Johnson Company through its General Manager, J. W. Elliott, Jr., wrote one of these four letters to Taylor-Carraway on June 28, 1990.

E. Elizabeth Bates

We earlier noted that Bates had primary responsibility for Southern Marketing's sales from north of Hattiesburg up to Tupelo. After the State of Georgia entered a "cease and desist" order against NBAT on October 24, 1989, Gene Roberts, Vice President, Marketing/Corporate Development for NBA, the third-party administrator for NBAT, wrote Bates on November 7, 1989, as President of Southern Marketing in Jackson to explain Georgia's entry of the "cease and desist" order against NBAT. The gist of the letter was that Georgia had issued this order regardless of NBAT's ERISA status. Roberts explained that NBA had gone to court to establish NBAT's status as an ERISA trust and that he would "look to the courts to confirm that position." Bates testified that Roberts discussed Georgia's cease and desist order with NBA representatives at the annual NBAT meeting in Louisville, Kentucky, in November, 1989. On January 13 or 14, 1990, Bates and one other person met with Mark Haire, the staff attorney for the Mississippi Department of Insurance, to discuss these developments at NBAT.

On February 14, Bates, Carraway, and Taylor met with Commissioner Dale, Charles Weeks, who was then a special assistant attorney general assigned to the office of the Commissioner of Insurance, Haire, and Andy Glogower, whom we know as the president of NBAT. The general topic of conversation at this meeting was whether NBAT was solvent. As to what was said and as to who said it, the witnesses' testimony was hardly the exemplar of consistency. Bates insisted that the Department of Insurance accepted Glogower's representation that NBAT would become fully insured by May 1, 1990, because Glogower was buying a life insurance company that would insure it. Whether the participants in this meeting discussed the impact of Section 83-17-103 of the Mississippi Code of 1972 on Bates' and Taylor's personal liabilities for selling NBAT coverage was seriously disputed among those present at this meeting who later testified at the trial. Both Haire and Weeks testified that they advised Bates and Taylor that because NBAT was not authorized to do business in this state as an insurance company, they would be personally liable for any loss which any of their insureds might sustain if NBAT did not pay their insureds' claims.

For six years before she applied to Cal-Pac for Lexington's errors and omissions insurance by her application dated April 24, 1990, Bates had worked as an insurance agent without such insurance. The form for her application was identical to the form for her brother's application; and she answered all four of the questions on her application, "NO," just as Taylor would later do on June 22, 1990. Although NBAT accounted for eighty percent of Southern Marketing's income in Jackson, she wrote on her application that Association Life was the primary company by which she was then licensed.

Six days after Bates applied for Lexington's errors and omissions insurance, the Florida Department of Insurance issued an immediate Final Order and Notice and Order to Show Cause against Taylor-Carraway on April 30. More than six months later, on December 17, 1990, the Florida Department of Insurance and Taylor-Carraway entered into what was entitled "Joint Settlement Stipulation for Consent Order," the primary purpose of which was to prohibit Taylor-Carraway from selling insurance of any kind until after the Florida Insurance Department had properly licensed it. The order included further provisions to enforce Taylor-Carraway's payment of all claims made by Florida residents against NBAT on which it defaulted.

F. Instigation of Litigation against Taylor and Bates

1. Bird-Johnson litigation

Round one of this litigation began on September 6, 1990, when Bird-Johnson Company (Bird-Johnson) filed its complaint in the Circuit Court of Jackson County, Mississippi, against Charles R. Taylor, Bobby C. Taylor, James Carraway, Eleanor Fuller, and Taylor-Carraway Benefit Administrators, Ltd., to recover the sum of $97,247.07. Bird-Johnson claimed it had paid this sum to reimburse its employees and to pay third party providers for services and medical benefits which were covered by NBAT's agreement with it. Taylor-Carraway had sold this coverage to Bird-Johnson, which had written Taylor-Carraway Insurance Agency on June 28, 1990, to demand that it pay the large number of "outstanding claims remaining unpaid" against its group coverage with NBAT.

In its complaint, Bird-Johnson charged that:

> National Business Association Trust has defaulted in reimbursing Plaintiff's employees for covered medical expenses and has defaulted in paying third party providers for medical services and covered benefits supplied to Plaintiff's employees under provisions of the National Business Association Trust policy.

Bird-Johnson based the Defendants' liability on Section 83-17-103 of the Mississippi Code of 1972, to which we previously alluded in our discussion of the February 14, 1990, meeting in Commissioner Dale's office. It charged that NBAT was "an unauthorized insurer" and that therefore the Defendants were liable to it pursuant to Section 83-17-103. Bird-Johnson further charged that the Defendants had "purposely misled [it] and its employees by withholding vital information concerning the financial solvency of NBAT." It then claimed that the Defendants' actions had been "so callous and in disregard for the rights of [Bird-Johnson] as to give rise to the imposition of punitive damages and attorney's fees."

On September 21, 1990, Taylor wrote to Cal-Pac to put it "on notice of potential claims against Southern Marketing Services and Bobby C. Taylor." He enclosed with his letter a copy of the summons from the Bird-Johnson lawsuit. In his letter Taylor advised Cal-Pac that:

> I am the agent of record on the following cases written through [NBAT], through which additional potential claims could arise."

He then identified seven employers by whom these additional claims might be made.

James Flaherty, senior claims examiner for Lexington, wrote Taylor on October 24, 1990, in response to Taylor's letter to Cal-Pac dated September 21. In his letter, Flaherty advised Taylor that Lexington "will be unable to represent your interest in this litigation" because of the following exclusion found in Taylor's errors and omissions policy:

> This policy does not apply to any claim based upon, arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay of any insurance company or any benefit plan.

Flaherty asked Taylor to submit any other material which would allow Lexington to reevaluate its position on whether it would represent his interest in this litigation. He concluded the letter, "Waiving none, and reserving all rights and privileges under [your policy], I remain, Very truly yours, James F. Flaherty, Claims Examiner." On February 8, 1991, Taylor wrote Flaherty to renew his demand that Lexington pay the claims which various insureds had made against him, a list of some of which he enclosed with his letter. He reminded Flaherty that Lexington had insured against loss from his errors and omissions for several years and that he had "faithfully paid [his] premiums."

The Bird-Johnson claim is not involved in the case *sub judice*. The case *sub judice* involves only the two cases which were filed in the Circuit Court of Hinds County.

2. Complaints filed by Richard Palmer *et al.* and Daigle & Associates

The second round of this litigation began on May 29, 1991, when different plaintiffs filed separate lawsuits in the Circuit Court of Hinds County, Mississippi. Daigle & Associates, Inc. (Daigle), an insurance agency incorporated under the laws of Mississippi, which maintained an office in Clinton, sued Southern Marketing Services and Bates for $42,161.73. Daigle claimed that Southern Marketing and Bates owed it this sum for claims which certain of their clients' employees had made against NBAT, but which NBAT had failed to pay. Daigle alleged that it had solicited bids from Southern Marketing and Bates and had otherwise consulted with the defendants about "placing insurance for its clients."

The second complaint was filed by Richard Palmer and twenty five other named plaintiffs, all of whom were employees of Ruth Fertel, Inc. (Ruth Fertel). Ruth Fertel had purchased health and medical coverage by NBAT from the four defendants designated in their complaint. The defendants were Taylor-Carraway Benefit Administrators, Ltd., Southern Marketing Services of Louisiana, Inc., Southern Marketing Services, Inc., and Bobby Taylor. Ruth Fertel operated Ruth's Chris Steakhouses in Louisiana and elsewhere. The Fertel employees sued the defendants for $83,045.86, which was the total of their unpaid claims against NBAT. These twenty six plaintiffs alleged that one or more of these four defendants had sold this coverage to their employer.

The same attorney represented all the plaintiffs in both complaints. As in the Bird-Johnson complaint filed in Jackson County, these plaintiffs based their claims on, among other theories, the defendants' selling this coverage for NBAT "without determining whether [it] was authorized to do business within the State of Mississippi and was approved by the Insurance Commissioner of the State of Mississippi." Plaintiffs alleged that the defendants violated Section 83-17-103 of the Mississippi Code and that their violation of this statute was negligence per se.

II. Course of Litigation in the trial court

Bates, Taylor, and the corporate defendants did not notify Lexington of the filing of the two complaints against them in the Hinds County Circuit Court ; neither did they demand that Lexington defend them in these cases. Instead, they filed motions to bring Lexington in as a third-party defendant in both cases. The trial court sustained their motions; after which the defendants then filed their respective third party complaints in these two cases against Lexington. On August 6, 1992, the trial court entered an Order Granting Continuance of Trial and Granting Consolidation, by which it consolidated these two cases for trial and scheduled that trial to begin on Monday, November 16,

1992.

A. Lexington's Motion to Amend its Answer

On January 14, 1992, Lexington filed a motion to amend its answer to third party complaint. It attached to its motion as "Exhibit A" a copy of its proposed Amended Answer, in which it included at least seven additional defenses which it had not asserted in its original answer. Lexington asserted in its motion to amend that "preliminary discovery in the case has given rise to [these seven additional defenses]." On March 10, 1992, the trial court granted Lexington's motion to amend its Answer within thirty days of that date. In its order, the trial court recited that "counsel for Third-Party Plaintiffs have no objection, ..."

Eight days later on March 18, 1992, Lexington filed its amended answer in the trial court. Lexington's attorney attached to the amended answer his certificate dated March 18, 1992, in which he certified that he "ha[d] that day mailed, by certified United States mail, postage prepaid, return receipt requested, a true and correct copy of the . . . Amended Answer" to the plaintiff's and third-party plaintiff's respective counsel.

Lexington included the following defense in the amended answer which it actually filed on March 18, 1992:

FOURTEENTH DEFENSE

> The named insured on the subject policy made material misrepresentations in his application for the subject policy, which application was made a part of the subject policy, and that as such, the subject insurance policy was void from its inception.

Lexington had omitted its fourteenth defense from the copy of its proposed amended answer which it had attached to its motion to amend answer as "Exhibit A."

Nearly nine months later, on November 13, 1992, the Friday before the Monday when the trial was scheduled to begin, Bates and Taylor filed their motion to strike Lexington's amended answer. Clyde H. Gunn III, and Catherine H. Jacobs, attorneys for Taylor and Bates attached to their motion to strike as "Exhibits E and F" their respective affidavits to support their clients' motion to strike. Jacobs and Gunn swore in their respective affidavits that neither of them had read the amended answer when they received it because they had read the copy of the proposed amended answer which Lexington had attached to its motion to amend its answer. Apparently, Jacobs and Gunn assumed that the amended answer which Lexington filed was identical to the proposed amended answer attached as "Exhibit A" to the motion to amend answer.

Both lawyers further deposed in their affidavits that they had attended depositions on November 2, 1992, during which Lexington's attorney asked Bates and Taylor's expert witness questions about material misrepresentations. They further deposed that after they received Lexington's supplemented answers to their interrogatories four days later, Gunn reviewed for the first time the amended answer

as filed. Only then did he discover that the amended answer contained Lexington's fourteenth defense of material misrepresentation and two other defenses which also had been omitted from the proposed amended answer. Jacobs and Gunn concluded their affidavits by stating that Lexington's lawyer, Ken Adcock, had never advised them that the amended answer as filed differed from the proposed amended answer, which had been attached as Exhibit A to its motion to amend answer. Neither Jacobs nor Gunn denied receiving a copy of the amended answer as it was filed in accordance with Lexington's attorney's certificate of service attached to it.

On the Monday morning that trial began, the trial court heard argument on Bates and Taylor's motion to strike Lexington's amended answer. Ken Adcock, Lexington's counsel stated to the court that he advised Gunn that Lexington intended to raise the defense of material representation when Gunn deposed James Flaherty, Lexington's senior claims examiner on January 14, 1992, in Boston. Adcock further asserted that Gunn then asked Flaherty during the deposition if Lexington intended to raise this defense, to which Flaherty replied:

> On the renewal application, which becomes a part of the policy, there is a question that asks the applicant are you currently aware of any situation which may give rise to a claim against your E and O policy. I believe it was checked "No."

Gunn's version of the discussion in Boston was that Adcock told him that he was filing a motion, but that the motion was to expand Lexington's fifth defense. Gunn acknowledged that Flaherty gave the above quoted answer during his deposition. The trial court denied Bates' and Taylor's motion to strike Lexington's amended answer.

B. Course and result of the trial

At the beginning of the trial the Plaintiffs, Bates, and Taylor read into the record certain stipulations about Plaintiffs' claims against Bates, Taylor, and the corporate Defendants, pursuant to which the trial court awarded Plaintiffs judgments against the Defendants each of the Plaintiffs had sued. The trial lasted until the middle of the following week.

Richard Edmondson, an attorney whose office was located in Jackson, testified as Lexington's expert to establish the insurance industry's standard of care for an insurance carrier's determination of whether to defend its insured against another party's claim. Before Edmondson began to testify, Bates objected to Edmondson's testifying because Edmondson had represented Bates -- or perhaps Southern Marketing, the agency in Jackson which Bates operated -- in an earlier matter. The trial court overruled Bates' objection.

The jury returned a verdict for Lexington; and the trial court entered judgment for Lexington. After the trial court denied Bates and Taylor's motion for JNOV or , in the alternative, a new trial, Bates and Taylor appealed.

III. Issues and the Law

Bates and Taylor present these six issues for us to settle:

I. Whether the court erred in allowing the defense of material misrepresentation to be presented to the jury.

II. Whether the jury was properly instructed regarding the defense of material representation.

III. Whether Mr. Richard Edmondson should have been allowed to testify as an expert for the third-party defendant [Lexington] when he had previously represented the third-party plaintiff [Bates].

IV. Whether the plaintiffs were entitled to a peremptory instruction on the issue of liability as result of Lexington Insurance Company's failure to defend.

V. Whether the verdict was against the overwhelming weight of the evidence.

VI. Whether the court erred in denying post-trial motions?

A. General principles of law

During the trial, Bates and Taylor objected to Lexington's introduction into evidence of NBAT's insolvency because it's insolvency was irrelevant to Lexington's duty to defend them. During their arguments on the admissibility of this evidence, counsel for Bates and Lexington and the court engaged in this exchange of ideas:

> MS. JACOBS: When [Lexington] wrongfully failed to defend, they are not entitled to rely on the defense of material misrepresentation to avoid payment of the claims that these settlements and judgments are based on.
>
> MR. ADCOCK: Your honor, that's a common law defense that voids the whole policy.
>
> MS. JACOBS: It doesn't matter. It didn't excuse them from their duty to defend, Your Honor, not a bit. The

> fact that they raised material misrepresentation did not excuse them from their duty to defend.
>
> THE COURT: Is that a legal question for resolution by the Court?
>
> MS. JACOBS: Yes sir, it is. It's a question of law.

The parties' and Court's foregoing colloquy defined the fundamental issue on which this Court must ultimately resolve this appeal. That issue is, "Did Bates, Taylor, or both make misrepresentations to Lexington in their respective applications for Lexington's errors and omissions insurance that were both substantially false and material to Lexington's risk of insuring them?" If the answer to this question proves to be, "No," then Bates and Taylor win; and we must reverse and remand this case to the trial court. If the answer to this question proves to be "Yes," then Bates and Taylor lose; and we must affirm the trial court's judgment for Lexington.

This issue is fundamental because it was the policy of errors and omissions insurance that created Lexington's duty to defend Bates and Taylor. If that policy were void, then it could have imposed no duty on Lexington to defend them. One other issue not related to the fundamental issue remains to be resolved, and that is Bates and Taylor's third issue, which is "Whether Mr. Richard Edmondson should have been allowed to testify as an expert for the third-party defendant [Lexington] when he had previously represented the third-party plaintiff [Bates]."

B. Consideration and Resolution of Bates and Taylor's issues

1. Issue four

> IV. Whether the Plaintiffs were entitled to a peremptory instruction on the issue of liability as result of Lexington Insurance Company's failure to defend.

We consider Bates and Taylor's fourth issue first because it requires us to determine whether Lexington had a duty to defend Bates and Taylor. We begin our analysis of this issue with an effort to ascertain whether this question can be resolved as a matter of law under the facts of this case. However, were we to answer this question as a matter of law, we may yet be compelled to consider the weight and worth of the evidence on which the jury reached its verdict in favor of Lexington before we can conclusively resolve Bates and Taylor's fourth issue.

Bates and Taylor begin their argument on this issue by quoting the following provision from their errors and omissions policies which Lexington issued to each of them:

> With respect to such insurance as is afforded by this policy, the company shall defend any suit against the insured seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; and the company may make such investigation and with written consent of the insured make settlement on any claim as it deems expedient . . . .

Then they assert that "if any of the allegations of the complaint bring the action within the circumstances and terms covered by the policy, irrespective of what actual facts may prove to be, an insurer is contractually bound to defend the insured." Bates and Taylor point out that Bird-Johnson, Daigle, Palmer, and the other plaintiffs in their complaints allege that they were negligent *per se* when they sold group medical and health coverage by and insurer that was not authorized to do business in Mississippi. Bates and Taylor stress that Section 83-17-103 of the Mississippi Code, which we have previously quoted, may render them personally liable for the payment of claims that NBAT, an unauthorized provider, failed to pay. Implied in their argument is the possibility that there may be some reason other than its insolvency for NBAT's nonpayment of the claims for which Bates and Taylor are being sued.

They correctly cite the cases of *Wilkinson v. Goza*, 165 Miss. 38, 145 So. 91 (1932) and *Ritchie v. Smith*, 311 So. 2d 642 (Miss. 1975) to support their assertion that violation of Section 83-17-103 makes a prima facie case of negligence against the agent who sells the coverage from the unauthorized insurer if the insurer fails to pay the claim. They argue that Bird-Johnson, Daigle, Palmer, and the other plaintiffs did not have the burden of proving that NBAT was insolvent in order to recover from them. Instead, the plaintiffs can recover from Bates and Taylor if their violation of Section 83-17-103, which was selling coverage by an unauthorized carrier, was the proximate cause of their unpaid claims against NBAT.

To counter Bates and Taylor's argument, Lexington relies on its policy's exclusion of any claim "based upon, arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay of any insurance company or any benefit plan." Lexington cites five cases, two from Georgia, one from Texas, one from Louisiana, and one from Florida to support its position that since the previously quoted exception excluded indemnification of Bates' and Taylor's claims, the duty to defend was also excluded. One of the Georgia cases involved a claim against NBAT.

In *Griffith v. Gulf Refining Co.*, 215 Miss. 15, 61 So. 2d 306 (1952), the vanquished appellee filed a petition for rehearing in which it urged the Mississippi Supreme Court to rely on decisions rendered by appellate courts in other states and reverse its decision which had been favorable to the appellant. In response to the petition for rehearing, the supreme court wrote:

> It is our conception that we are free to decide for ourselves all questions arising under the common law or under the statutory provisions of this state, that we are not bound by the decisions of courts of other jurisdictions on similar questions, that it is proper for us to consider them and that we may follow them only if we are satisfied of the soundness of the reasoning by which they are supported. Such decisions may have persuasive authority and

> we may still refuse to follow them if opposed to the public policy of this state. They may be entitled to respectful consideration if well reasoned and are promotive of justice, but they are not technically of force as precedents and we are at perfect liberty to disregard them.

Griffith, 61 So. 2d at 307 (citations omitted). Harmoniously with the quotation from *Griffith*, we think that decisions of our own supreme court are adequate precedent on which to rest our resolution of this issue.

In *State Farm Mutual Automobile Insurance Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970), State Farm declined to defend its insured owner of a pick-up truck, Hugh M. Taylor, Jr., when the insured's employee, W. L. Young, sued his employer for damages. *Id.* at 807-08. Young was injured when he fell from the bed of the truck where he had been riding to hold down two pieces of plywood lying in the truck's bed while Taylor was driving it. *Id.* at 807. State Farm declined to defend Taylor because the liability insurance policy "d[id] not apply . . . to bodily injury to any employee arising out of and in the course of . . . employment." *Id.* at 808. After Young had obtained a judgment against Taylor for $5,000, Taylor sued State Farm in chancery court for indemnity from State Farm for the judgment and $2,500 in attorney's fees which he had paid his own attorney to defend him against Young's claim. *Id.* The chancery court found that the employee exclusion clause did not deprive Taylor of State Farm's duty to defend him against Young's claim, and it rendered judgment against State Farm. *Id.* The Mississippi Supreme Court affirmed the judgment. *Id.* at 811. Regarding an insurer's duty to defend its insured, the supreme court wrote:

> The right of the insurer to exclusive control over litigation against its insured is accompanied by a correlative requirement that the insurer defend the insured against all actions brought against him on the allegation of facts and circumstances covered by the policy, even though such suits may be groundless, false or fraudulent. The traditional test is that the obligation of a liability insurer is to be determined by the allegations of the complaint or declaration. Moreover, a divergence may exist between the facts as alleged in the petition and the actual facts as they are known to or reasonably ascertainable by the insurer, in which latter case the insurer has a duty to defend, notwithstanding a policy exclusion as to employees.

Id. at 808 (citations omitted). This quotation succinctly explains an insured's duty to defend regardless of the possibility that the insurer's duty to indemnify payment of damages may otherwise be excluded by the terms of the policy.

The balance of this portion of the opinion on this issue is but a paraphrase of the quotation from *Taylor v. State Farm Mutual Insurance Co.* Lexington's potentially exclusive control over litigation against its insureds, Bates and Taylor, is accompanied by a correlative requirement that Lexington defend the insureds against all actions brought against them on the allegation of facts and circumstances covered by the policy, even though such suits may be groundless, false or fraudulent. The traditional test is that the obligation of a liability insurer is to be determined by the allegations of

the complaint or declaration. All three complaints filed against Bates and Taylor charged them with negligence per se for violating a Mississippi statute. Lexington's witnesses admitted that Lexington's errors and omissions policies contained no exclusion for indemnifying agents who were liable for damages which were the result of their negligence in selling coverage by an unauthorized insurer in Mississippi.

Moreover, the divergence which Lexington claimed existed between the facts as alleged in the petition (Bates and Taylor's negligent violation of Section 83-17-103) and the actual facts as Lexington had ascertained them (NBAT's insolvency was the cause of plaintiffs' loss, not Bates' and Taylor's negligence) did not absolve Lexington of its duty to defend Bates and Taylor notwithstanding the policy exclusion for indemnification of the insured's loss if their loss resulted from the insurer's insolvency.

The fact which relates to the issue of Lexington's duty to defend is the content of the complaints which the various plaintiffs filed against Bates and Taylor. We agree with Bates and Taylor that as a matter of applying the law to the content of the complaints filed against them to determine if Lexington had a duty to defend them pursuant to the terms of its errors and omissions policy, Lexington had a duty to defend them against the plaintiffs' claims. Of course, the errors and omissions policy which Lexington issued created this duty to defend.

In the colloquy which we quoted, Lexington's counsel argued that Bates' and Taylor's material misrepresentations created "a common law defense that void[ed] the whole policy." If Lexington is correct that its errors and omissions policy was void because of Bates' and Taylor's material misrepresentations, then Lexington had no duty to defend them after all. Therefore, before we can finally resolve this issue of whether Bates and Taylor were entitled to a peremptory instruction on the issue of Lexington's liability for its failure to defend, we must first consider whether Bates' and Taylor's alleged misrepresentations may have rendered these policies either void *ab initio* or voidable. Thus we depart from our further consideration of this fourth issue before we have finally resolved it to determine if the errors and omissions policy on which Bates and Taylor sued Lexington was void because of their material misrepresentations to Lexington.

2. Issue one

> I. Whether the court erred in allowing the defense of material misrepresentation to be presented to the jury.

In this their first issue, Bates and Taylor argue that if Lexington had defended them under a reservation of rights and that if their claim against Lexington had been for indemnity, rather than for Lexington's failure to defend, the court's submission of the issue of material misrepresentation to the jury would have been appropriate. They then offer four reasons why the submission of this issue to the jury was inappropriate. They are:

> First, Lexington never relied upon material misrepresentations in the application as a reason for their refusal to provide a defense.

> Second, because the defense involved question of facts, Lexington was not entitled to rely on it in refusing to provide a defense.
>
> Third, the defense of material misrepresentation is not properly before the court.
>
> Fourth, a material misrepresentation should render this policy voidable rather than void *ab initio*.

We begin by considering their third reason, *i. e.,* this defense is not properly before the court.

a. Trial Court's denial of their motion to strike Lexington's amended answer

Bates and Taylor complain that Lexington's amended answer which it filed with the court contained the defense of material misrepresentation, but that the copy of the proposed amended answer which it attached to its motion to amend as "Exhibit A" did not include that defense. Bates and Taylor emphasize that they only agreed to permit Lexington to amend its answer because they relied on the contents of the proposed amended answer as it was included in "Exhibit A" to the motion to amend. They argue that Rule 15(a) of the Mississippi Rules of Civil Procedure allowed Lexington to amend its answer "only by leave of the court or upon written consent of the adverse party; . . . ." M.R.C.P. 15(a). They further point out that Lexington cannot argue that the issue of material misrepresentation was tried by consent pursuant to Rule 15(b) because they filed a motion immediately before trial to strike the amended answer.

Nevertheless, Bates and Taylor do not dispute that they received a copy of the amended answer as Lexington's counsel filed it pursuant to the certificate of service which its counsel attached to it. In *Cooley v. Cooley*, 574 So. 2d 694, 698 (Miss. 1991), the Mississippi Supreme Court opined:

> M.R.C.P. 5 mandates the giving of notice for pleadings subsequent to the original complaint. It allows service to be made upon the attorney of record for a subsequent pleading. It can be delivered or mailed. Notice given to the attorney of record has been held to be sufficient notice.

Bates and Taylor's counsel had a copy of the amended answer as filed for about six months before trial. Thus, they must be charged with notice of its contents from the date they received it. They justify their not examining it because they relied on the copy of the proposed amended answer attached to the motion to amend as "Exhibit A." They imply that Lexington's counsel should have

told them that this and two other defenses were included in the amended answer as filed. We recall that Lexington's counsel told the trial court when it was hearing the motion to strike the amended answer that he advised Bates and Taylor's counsel in Boston in January, 1992, that his client would raise the defense of material misrepresentation. In their brief, Bates and Taylor admit that Lexington's counsel so advised them in Boston. They further admit that their response to his so advising them was to review "Exhibit A" to Lexington's motion. They did not review the amended answer itself until less than one week before trial. We find that Lexington's counsel's service of the amended answer as filed on counsel for Bates and Taylor constituted actual notice of the contents of the amended answer, and we therefore hold that the trial court did not err when it denied their motion to strike the amended answer as filed. Lexington's failure to include the defense of material misrepresentation in its proposed amended answer was insufficient reason to strike the amended answer as it was actually filed when counsel opposite had been given sufficient notice of the contents of the amended answer as filed for six months before it moved the court to strike it.

b. A material misrepresentation should render this policy voidable rather than void *ab initio*.

We next address what was Bates and Taylor's fourth reason to support their assertion that the trial court inappropriately submitted the defense of material misrepresentation to the jury. They state in their brief that "[a] misrepresentation is material to the extent that it permits recision depending upon the probable and reasonable effect that truthful answers would have had on the insurer." They cite *Sanford v. Federated Guaranty Insurance Co.,* 522 So. 2d 214 (Miss. 1988) to support that assertion. They then note that in *Massachusetts Mutual Life Insurance Co. v. Nicholson,* 775 F. Supp. 954, 959 (N.D. Miss. 1991), the United States District Court for the Northern District opined that "[a] misrepresentation is material if knowledge of the true facts would have influenced a prudent insurer in determining whether to accept the risk." Bates and Taylor then argue that Lexington has failed utterly to prove that the alleged misrepresentation on Bates' and Taylor's applications were material to the risk of insuring either of them.

Bates' and Taylor's misrepresentations about which Lexington complains are their "No" answers to the following questions which their applications contained: "[Have you sustained] an E&O loss or had such a claim made against you?" and "[Do you have] [a]ny reason to anticipate a claim being made against you?" Susan Angelo was the claims underwriter for Lexington's errors and omissions policies for insurance agents. She testified about the relationship of Bates' and Taylor's negative answers to these two questions and her approval of insuring them as follows:

> A. For instance, there are four questions that are important to the underwriter and one of them is any reason to anticipate a claim being made against you. [Bates and Taylor] both say no in this case so the broker [Cal-Pac] had authority to issue the policy. Had they said yes, it would have come to Boston to be reviewed. If the insured had reason to anticipate a claim, I would investigate into what those circumstances were and if they had anything to do with an insolvent insurance company, I would have declined to write the risk completely.

> Q. Why was that information material to you as an underwriter?
>
> A. Basically, these four questions give an underwriter most of the information they need to determine whether or not a risk should be written or issue a policy. It gives the underwriter a history of the insured. It tells them how much claim activity there's been in the past, what types of claim activity there's been, and it also protects the company from potentially picking up exposures they have not contemplated.
>
> Q. Again, are the answers to Number 2 an attempt to determine and distinguish a good risk from a bad risk?

A. Absolutely, yes.

Bates and Taylor describe Angelo's testimony as "subjective" and "self-serving." They assert that her testimony "is no proof of an objective standard." Thus, they argue that "Lexington acted at its own peril in failing to provide appropriate guidelines to its agents and employees to use in determining whether or not to issue policies to agents." Regardless of these characterizations of Angelo's testimony, to which neither Bates nor Taylor objected, her testimony constituted evidence which the jury was entitled to consider along with all the other evidence.

In *Casualty Reciprocal Exchange v. Wooley*, 217 So. 2d 632, 634 (Miss. 1969), Lonnie T. Wooley procured an automobile liability insurance policy from Casualty Reciprocal Exchange (CRE) through the Jabour Agency in Vicksburg. In his application were a series of thirteen questions, among which were: (1) Has any driver been involved in any accidents within the last three years?; (2) Has the license of any driver ever been revoked or suspended?; and (3) Has any company canceled or refused to renew insurance for applicant or any driver? *Id.* Wooley falsely answered these three questions and two other questions. *Id.* at 635. When CRE investigated Wooley's application and discovered his false answers to these five questions, it canceled the policy as of noon on March 11, 1967. *Id.* The day before, March 10, Wooley was involved in an automobile accident. *Id.* CRE filed suit against Wooley to cancel the automobile liability policy *ab initio* because of the fraudulent answers in Wooley's application. *Id.* The chancery court sustained Wooley's motion to exclude the evidence and dismissed CRE's bill of complaint. *Id.* at 632. The Mississippi Supreme Court reversed the chancellor and remanded the case for further proceedings consistent with its opinion. *Id.* at 638. In its opinion, the supreme court wrote:

> The first question for our decision is whether the false statements in the application entitled [CRE] to rescind this policy absent waiver or estoppel. The statements in the application were false; the answers were supplied by Insured [Wooley]; and *they were material to the risk.* [CRE] had a right to rely on these facts. They were made for the

> purpose of inducing [CRE] to enter into the insurance contract which it would not have done if true answers had been given. Absent waiver or estoppel, [CRE] is entitled to have the policy cancelled ab initio.

Id. at 635. (emphasis added).

In *Sanford v. Federated Guaranty Insurance Co.*, 522 So. 2d 214 (Miss. 1988), Robert Gary Sanford applied to Federated Guaranty Insurance Company (FGIC) for a liability insurance policy to insure his 1983 Mazda truck. *Id.* at 215. When the FGIC agent who was completing Sanford's application asked him if he had been charged with speeding in the past twelve months, Sanford replied that he had not. The truth was that Sanford had received two speeding tickets in the preceding twelve months. *Id.* Based on Sanford's misrepresentation about speeding, FGIC denied coverage, rescinded the policy, and refunded Sanford's premiums. *Id.* at 216. Sanford sued FGIC for breach of contract and bad faith. *Id.* The trial court entered summary judgment for FGIC, from which Sanford appealed. *Id.* The Mississippi Supreme Court reversed the summary judgment and remanded the case to the trial court. *Id.* at 218.

One of the issues in *Sanford* was whether Sanford's statement that he had not received the two speeding tickets was a warranty or a representation. *Id.* at 216-17. After the supreme court found that his statement was a representation, and not a warranty, it noted:

> Because Sanford's statement . . . was a representation, rather than a warranty, it could invalidate the policy only if it was material *and* not substantially true.

Id. The court then explained:

> The materiality of a representation is determined by the probable and reasonable effect which truthful answers would have had on the insurer. . . . *Materiality of a breach of contract is a question of fact.*"

Id. (emphasis added). The supreme court then concluded:

> Under these circumstances, the evidence presented a fact issue as to materiality of the false statement; i.e., there was a jury question as to the probable and reasonable effect a truthful answer would have had on the insurer's decision. Put another way, it cannot be said that reasonable jurors could not differ as to whether a truthful answer would reasonably have affected FGIC's decision to grant or deny coverage.

Id. at 217-18. It reversed the trial court's entry of summary judgment for FGIC and remanded the case to the trial court.

Both *Sanford* and *Wooley* render Angelo's testimony relevant to Bates and Taylor's fourth reason why it was inappropriate for the trial court to submit the issue of their purported material misrepresentation to the jury. Angelo testified that had Bates and Taylor answered the two questions we quoted in the affirmative, she, not Cal-Pac, would have reviewed their applications and investigated them further. She said that if Bates and Taylor had anything to do with an insolvent insurance company, she would have declined to write the risk completely. She testified that the four questions protected the company from potentially picking up exposures they have not contemplated. We gather from our review of the record that among "exposures they had not contemplated" would be the duty to defend where the duty to indemnify was excluded by the policy.

Bates' and Taylor's answers were manifestly relevant to Lexington's duty to defend under the terms of its errors and omissions policy, even if they were not relevant, as Bates and Taylor contend, to the duty of indemnification. As Angelo testified, the answers to those four questions protected Lexington from potentially picking up exposures, *i. e.*, duty to defend, it had not contemplated and did not want Therefore, Bates' and Taylor's "No" answers to two of the questions had a "probable and reasonable effect . . . on the insurer's decision to insure them." Thus, *Sanford* and *Wooley* rendered their answers material.

Wooley also contradicts Bates and Taylor's assertion that Lexington's errors and omissions policy was voidable, but not void *ab initio.* We previously quoted from *Wooley* in which the supreme court opined that the statements in the application were false; the answers which the insured supplied were material to the risk, and that the insurer had a right to rely on these facts. "Absent waiver or estoppel, [CRE] is entitled to have the policy canceled ab initio." Based on *Wooley*, we reject Bates and Taylor's contention that their representations, if material and if false, rendered the policies voidable rather than void *ab initio.* We hold that if the negative answers to the two questions about claims having been or to be made were not substantially true, *i. e.*, substantially false, and were material to whether Lexington would assume the risk of insuring Bates and Taylor, then the errors and omissions policies were indeed void *ab initio.*

c. Lexington never relied upon material misrepresentations in the application as a reason for their refusal to provide a defense

Because the defense involved question of facts, Lexington was not entitled to rely on it in refusing to provide a defense

Whatever merit these reasons not to submit Lexington's defense of material misrepresentation may have had if the errors and omissions policy had been in full force and effect, our conclusion that these policies were potentially void *ab initio* may render it unnecessary for us to consider these two

reasons further. We next consider Bates and Taylor's second issue of whether the jury was properly instructed regarding the defense of material representation.

3. Issue two

> II. Whether the jury was properly instructed regarding the defense of material misrepresentation.

The trial court granted three instructions on the matter of Bates' and Taylor's material misrepresentations. Jury instruction No. TPD-3(A) read as follows:

> You are instructed by the Court that in determining whether or not Elizabeth Bates and Bobby Taylor made material misrepresentations of fact in their application for errors and omissions coverage with Lexington Insurance Company such as to render the subject policies void, it is not necessary that the material misrepresentations be shown to have resulted from fraud or any actual intent on the part of Elizabeth Bates and Bobby Taylor to deceive, rather all that must be shown is the material falsity of any such statement in the application.
>
> You are further instructed by the Court that if you find for Third-party Defendant, Lexington Insurance Company, on this issue of misrepresentation, the policy of Bates and/or Taylor is void and there can be no duty to defend or coverage for any of the alleged suits or claims alleged against Bates and Taylor and you may not award actual or punitive damages.

Bates and Taylor object to TPD-3(A) because they argue that it requires their negative answers to the questions to be warranties, which must be literally true regardless of their relevance to the risk which the insured applies to the insurer to assume. They then argue that "[r]epresentations do not have to be true. As long as there is an absence of an intent to deceive, the misrepresentation will not affect coverage." They then refer to *Sanford v. Federated Guaranty Insurance Co.* to support their assertion that:

> [A]n insured's statement on his application that he had not been charged with speeding in the past year even though he had been charged with speeding twice did not invalidate the policy as a matter of law because there was no intent to deceive on the part of the insured who testified that he simply forgot that he had received those tickets.

We reject outright Bates and Taylor's interpretation of *Sanford*. Sanford involved an appeal by the insured from a summary judgment which the trial court had granted the insurer. Thus, the question was whether there were any material issues of fact. The supreme court found that "[t]he evidence presented a fact issue as to materiality of the false statement; *i. e.*, there was a jury question as to the probable and reasonable effect a truthful answer would have had on the insurer's decision." In

Sanford, 522 So. 2d at 217, the insured's intent to deceive had nothing to do with anything. The question to be resolved by the jury was whether Sanford's admittedly false statement about his receiving no speeding tickets was relevant to the insurer's refusal to insure him. The supreme court said nothing about whether Sanford made the false statement with the intent to deceive his insurer. We conclude that *Sanford* does not support Bates and Taylor's argument on this issue.

Lexington rebuts their argument by focusing on the text of Jury Instruction 3P-11A, which Bates and Taylor submitted. That instruction read:

> The Court instructs the jury that under the law of the State of Mississippi and the policies of insurance on which suit is brought in this case, all statements made on the applications by Bobby Taylor and/or Libby Bates, in the absence of fraud, are deemed representations and not warranties. A warranty must be literally true, and its materiality can not be the subject of inquiry. A representation is a statement which the applicant believes to be true at the time the statement is made. If the statement is not material to the risk, in the absence of fraud, its falsity will not invalidate the policy or provide the basis for the denial of the claim.
>
> Before Lexington Insurance Company can avoid the policies or deny coverage because of material misrepresentations allegedly made by Bobby Taylor and/or Libby Bates on their applications for insurance, it must prove that Bobby Taylor and/or Libby Bates did not tell the truth concerning their knowledge of or assertion of or anticipation of claims as defined by the policies issued to them by Lexington Insurance Company, and that the misrepresentations, if any, made by Bobby Taylor and/or Libby Bates were material to the risk.
>
> Thus, if you find from a preponderance of the evidence that Bobby Taylor and/or Libby Bates did not tell the truth with respect to their knowledge of or anticipation of claims on the applications for insurance and that the misrepresentations, if any, were material to the risk, then you must find for the Third-Party Defendant,Lexington Insurance Company, and against Bobby Taylor and/or Libby Bates.

From the cases on which we have relied to resolve some of the issues presented by Bates and Taylor and from which we have quoted to support our resolution of these issues, we think that this instruction is a correct statement of the law as it applies to the evidence in this case. Lexington asserts that by their submitting this instruction on material misrepresentation, Bates and Taylor waived their right to object to its instructions on material misrepresentation. Apparently, Bates and Taylor interpret Lexington's assertion to mean that by submitting their instruction, they waived their right to object to Lexington's defense of material misrepresentation. We do not interpret Lexington's assertion to mean this. Bates and Taylor were free to submit jury instruction 3P-11A without waiving their right to object to Lexington's use of the material misrepresentation defense. In *Peoples Bank & Trust Co.* v. *Cermack*, 658 So. 2d 1352, 1356 (Miss. 1995), the Mississippi Supreme Court wrote:

> On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Accordingly, defects in specific

> instructions do not require reversal "where all instructions taken as a whole fairly--although not perfectly--announce the applicable primary rules of law."

(citations omitted). From our review of Lexington's three instructions and Bates and Taylor's one instruction on the subject of material misrepresentation, and Bates' and Taylor's arguments which attack Lexington's instructions on their defense of material misrepresentation, we conclude that the jury was quite properly and fairly instructed on the issue of material misrepresentation. Thus, we decide Bates and Taylor's second issue adversely to them.

4. **Issues five and six**

> V. Whether the verdict was against the overwhelming weight of the evidence.
>
> VI. Whether the Court erred in denying post-trial motions.

Bates and Taylor offer us no arguments on either of these two issues. With no argument there can be no citation of authority. With neither argument nor citation of authority to support a party's position on an issue, we need not consider that issue. In *Terrell v. Mississippi Bar*, 662 So. 2d 586, 591 (Miss. 1995), our state's supreme court wrote, "This Court has held there is no obligation to consider any assignment of error unsupported and unaddressed in a party's submitted brief(s)." (citations omitted). Thus, we have no obligation to consider either of these two issues; and we do not.

5. **Return to issue four**

Our determination that Bates' and Taylor's errors and omissions policies could become void *ab initio* if either of them made misrepresentations for Lexington's coverage that were material to that company's risk in insuring them requires that we return to the ultimate resolution of issue four, which is whether Bates and Taylor were entitled to a peremptory instruction on the issue of liability as a result of Lexington's failure to defend.

In *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993), the Mississippi Supreme Court reiterated its standard of review regarding the question of whether a trial court erred when it did or did not grant a peremptory instruction. That standard remains as follows:

> This Court's standards of review regarding a denial of a judgment notwithstanding the verdict and a peremptory instruction are the same. Our standards of review for a denial of a judgment notwithstanding the verdict and a directed verdict are also identical. Under this standard, this Court will:
>
> > consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the

> appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Id. at 252.

Furthermore, we have quoted from the *Sanford* opinion in which the supreme court stated that "the evidence presented a fact question as to materiality of the false statement; *i. e*., there was a jury question as to the probable and reasonable effect a truthful answer would have had on the insurer's decision." *Sanford*, 522 So. 2d at 217. In the case *sub judice* the evidence presented a fact question as to the materiality of Bates' and Taylor's representations that they had not had an E&O claim made against them and that they knew of no reason to anticipate claims' being filed against them to "the probable and reasonable effect a truthful answer would have had on the insurer's decision [to assume the risk of insuring Bates and Taylor]." The jury returned its verdict for Lexington.

The jury's verdict is consistent with its determination that Bates' and Taylor's representations, particularly about their having no reason to anticipate claims' being filed against either of them, were not "substantially true" and thus were material misrepresentations. The jury members were fully entitled under all the instructions on the question of material misrepresentation to conclude that both Bates' and Taylor's "substantially true" answers to the question of whether they had reason to anticipate a claim's being made against them ought to have been "Yes." They were also entitled to conclude that their less than "substantially true" answers to this question were material misrepresentations on which Lexington was entitled to rely in determining whether to insure them. Susan Angelo so testified. Particularly were Bates' and Taylor's answers material to Lexington's duty to defend them even if its duty to indemnify had been excluded by the terms of the policy.

The facts in this case did not point so overwhelmingly in favor of Bates and Taylor that reasonable men could not have arrived at a verdict contrary to them. To the contrary, there was substantial evidence to support the jury's verdict so that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions about the truth or falsity of Bates and Taylor's representations and about their materiality to Lexington's determination of whether to insure either or both of them. Therefore, we conclude that the trial court did not err when it denied Bates and Taylor's motion for a peremptory instruction on the issue of liability as a result of Lexington's failure to defend.

6. **Issue three**

> III. Whether Mr. Richard Edmondson should have been allowed to testify as an expert for the third-party defendant [Lexington] when he had previously represented the third-party plaintiff [Bates].

On this issue Bates and Taylor argue that Edmondson violated Rules 1.6 through 1.9 of the Mississippi Rules of Professional Conduct by divulging to Lexington's counsel information about a previous matter in which he represented Bates and Southern Marketing, which matter, incidentally, had terminated well before Edmondson testified as Lexington's expert on the standard of care prevalent within the insurance industry for determining whether an insurer owes its insured a duty of defense. Bates and Taylor complain that Lexington's counsel used the information which they allege Edmondson gave him to cross-examine Bates about earlier claims which had been made against her or Southern Marketing. The following quotation from Bates and Taylor's brief appears relevant to our resolution of this issue:

> If Edmondson disclosed this information to Adcock [Lexington's attorney], as it appears he did, it constituted a breach of the attorney-client privilege and was an absolute violation of Rule 1.6 of the Rules of Professional Conduct."

Even to Bates and Taylor it only "appears" that Edmondson disclosed this information to Lexington's attorney. They offer no "hard" evidence that Edmondson disclosed this information to Adcock. The question, however, is what testimony of Edmondson became objectionable because it pertained to his past representation of Bates. We have reviewed Edmondson's testimony, but we can find absolutely nothing in it that pertained to his former representation of Bates or Southern Marketing. Bates and Taylor confirm our declaration when they write in their rebuttal brief, "It has never been our contention that Mr. Edmondson violated the attorney-client privilege while he was on the stand."

Bates and Taylor cite no authority to support their argument that Edmondson's testimony was inadmissible because he had earlier represented Bates and perhaps Southern Marketing and had supposedly related to Lexington's counsel information concerning that representation that Lexington's counsel had used to cross-examine Bates about earlier claims which had been made against her or Southern Marketing. The Mississippi Supreme Court recognizes that confidential communications between a lawyer and a client are privileged. In *Frierson v. Mississippi Road Supply Co*., 221 Miss. 804, 75 So. 2d 70, 72 (1954), the supreme court held that the trial court erred when it allowed a party's attorney to testify about drawing a bill of sale for that party, his client, when the client objected.

> So, it was undenied that before, and at the time of seizure, the tractor was in the possession of Lyman, and that the appellants had never been in possession. Besides, their testimony that they did not own the tractor could not be ignored. The only evidence of their ownership, and thereby constructive possession, was the testimony of the attorney in respect to the preparation of the bill of sale. Although he was the attorney for the corporation in working out the business transaction between it and the Friersons, he was certainly the attorney of the Friersons in preparing the bill of sale for them. Consequently the relation was privileged, and the objection should have been sustained.

Id. Bates and Taylor have conceded that Mr. Edmondson did not violate the attorney-client privilege while he was on the stand. Such a violation would be the only basis for this Court to sustain Bates and Taylor's objection to his testimony. Therefore, we hold that the trial judge did not err when he allowed Edmondson to testify about the standard of care which prevailed in the insurance industry for determining whether an insurer owed its insured a duty to defend.

IV. Conclusion

Had Bates' and Taylor's errors and omissions policies issued by Lexington not been void *ab initio* because their representations were both substantially false and material to Lexington's decision whether to insure them, these policies would have imposed on Lexington a duty to defend Bates and Taylor. Bates' and Taylor's negative representations that they knew of no claims that had been presented to them and that they knew no reason to anticipate that any claims might arise against them were clearly material not only to Lexington's duty to indemnify where the policy did not exclude its duty to indemnify but also to Lexington's duty to defend them against claims for the indemnification of which they had no duty.

The jury returned a verdict for Lexington. Pursuant to the instructions which the trial court submitted to the jury at the request of Bates, Taylor, and Lexington on the issue of material misrepresentation, we conclude that the jury decided that their misrepresentations were not "substantially true" and were indeed material to Lexington's decision about whether to insure them. Thus, the jury determined that Bates and Taylor had made material misrepresentations to Lexington, and that therefore its errors and omissions insurance policies were void *ab initio*. Because the policies were void *ab initio*, they could not have created and imposed on Lexington any duty to defend its insureds, Bates and Taylor.

The issue about whether the court erred when it overruled Bates' and Taylor's objections to Edmondson's testimony is devoid of any merit in so far as this appeal is concerned. Ours is not the appropriate forum in which to resolve such allegations as Bates and Taylor make against Edmondson's violations of the rules of professional conduct. We therefore affirm the trial court's judgment for Lexington.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANTS.

FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.